

Section 68.4(a) of the Commission's Rules Governing Hearing Aid Compatibility

Its Attorneys

SUMMARY

In its *Further Notice of Proposed Rulemaking*, the Commission seeks comment regarding whether it should extend the live, in-store testing requirement for hearing aid compatible wireless phones, currently applicable to retail outlets owned and operated by wireless carriers and service providers, to independent retailers. RadioShack believes that the Commission should not extend its in store testing requirement to independent retailers. Not only does the Commission lack the necessary legal authority to do so, but live, in-store testing is less effective than existing return policies at ensuring that hearing impaired consumers have the wireless phones they need.

RadioShack understands the Commission's desire to provide hearing impaired users with wireless phones that meet their needs, but as set forth in these Comments the Commission lacks the authority under the Hearing Aid Compatibility Act, the Communications Act or principles of agency law to do so. The courts have repeatedly held that the Commission's regulatory power is limited by its statutory grant of authority. A review of the Hearing Aid Compatibility Act and its legislative history indicates that, while Congress explicitly intended that the Commission regulate the *manufacture* of hearing aid compatible telephones, it did not provide the Commission with general power to regulate retailers. Any limited authority that existed to regulate beyond the manufacture of hearing aid compatible landline phones does not extend to wireless phones, which are portable and purchased for individual and exclusive use.

RadioShack's Comments further demonstrate that the Commission lacks the authority to regulate independent retailers in this context under the Communications Act. The Commission inquires whether such authority might exist under § 217 of the Communications Act or under general agency law, but such inquiry presumes that an agency relationship actually exists. The contractual relationships between independent retailers and wireless carriers are complex and

varied, and as indicated in RadioShack's Comments, the Commission's presumption is flawed. Nonetheless, even if an agency relationship were found, § 217 of the Communications Act and general principles of agency law might provide the Commission authority over the principal (*i.e.*, the wireless carrier), but does not provide the Commission the authority to regulate the agent (*i.e.*, the retailer).

Furthermore, RadioShack separately demonstrates that even if the Commission finds that it has the authority to regulate independent retailers in this area, it should not. Such an extension of the live, in-store testing requirement would place significant burdens on independent retailers, but would provide the hearing-impaired customer with a test that is less effective than the extended testing opportunity offered by the generous return policy already provided by RadioShack and most other independent retailers. An extension of live, in-store testing would also require independent retailers to dedicate store or kiosk space and sales associate attention to the testing of hearing aid compatible wireless phones in a manner that would impair the ability of RadioShack and other retailers to serve other customers. In addition, because of the vagaries of signal quality at many retail store locations, the proposed testing requirement would, in many instances, provide the user an ineffective and inaccurate demonstration of which phone and which service might be best. Finally, RadioShack demonstrates that its existing 30-day product return policy is a far more effective means by which a customer can test the product and, unlike an in-store testing requirement, can also be used when a consumer purchases a pre-paid phone or other wireless phone over the Internet, by phone or from a catalogue, which increasingly is occurring in today's marketplace. For all of the reasons set forth in its Comments, RadioShack respectfully urges the Commission not to extend the live, in-store testing requirement of hearing aid compatible wireless phones to independent retailers.

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In the Matter of

WT Docket No. 01-309

RadioShack Corporation (“RadioShack”), by its attorneys, hereby submits the following comments in response to the Commission’s *Further Notice of Proposed Rulemaking* released on June 21, 2005 regarding its regulations governing hearing aid compatibility for wireless handsets.¹ As an independent retailer of wireless handsets, RadioShack is opposed to the extension of a live, in-store testing requirement to independent retailers.

RadioShack is one of the largest independent consumer electronics retailers in the United States. It owns and operates over 5,200 stores nationwide, with a store located, on average, within five miles of where each American lives or works. It sells thousands of products in each store, as well as a growing number of communications services, such as satellite, wireless and VoIP services. Although as a large retailer, RadioShack's total sales revenues topped \$4.8 billion in 2004 and its sales of wireless phones represent five percent of all wireless phone sales.

¹ See 47 C.F.R. § 20.19; see also *id.* § 68.4.

RadioShack also shares a number of characteristics with small independent retailers – the most important of which is that its average store size is only 2,500 square feet.

The Commission seeks comments on its the authority to extend the live, in-store testing requirement for hearing aid compatible wireless phones - currently required by the retail outlets owned and operated by wireless carriers/service providers - to independent retailers. If it does have such authority, the Commission also asks whether it should implement such an extension. RadioShack understands the Commission’s desire to provide the hearing impaired with the same opportunity to use wireless phones that exists for all consumers, but does not believe an extension of the live, in-store testing requirement is permissible or appropriate.

RadioShack’s Comments demonstrate why the Commission does not have authority under the Hearing Aid Compatibility Act (“HAC Act”), the Communications Act or under principles of agency law to regulate independent retailers in this area. RadioShack separately argues that even if the Commission finds that it does have such jurisdiction, the burdens associated with such effort are not in the public interest. Indeed, the generous return policies already provided by major independent retailers, like RadioShack, for all products provides a better opportunity for hearing impaired customers to test the use of their wireless phones than live, in-store testing.

II. QUESTIONS PRESENTED FOR COMMENT

In its *Further Notice of Proposed Rulemaking* (“*Further Notice*”),² the Commission seeks comment on whether it should “extend the live, in-store testing requirement to retail outlets that

² Section 68.4(a) of the Commission’s Rules Governing Hearing Aid Compatible Telephones, WT Docket No. 01-309, *Order on Reconsideration and Further Notice of Proposed Rulemaking* (June 21, 2005) [hereinafter *Further Notice*].

are not directly owned or operated by wireless carriers or services providers.”³ In doing so, the Commission also seeks comment, *inter alia*, on the following:

- Whether the FCC “has legal authority and the scope of that authority to require all stores to comply [with a live, in-store testing requirement];”
- Whether under provisions of Section 217 of the Communications Act or under “general agency law and the Hearing Aid Compatibility Act, [the Commission] could require those service providers, in their contracts with retailers selling their wireless services, to require live, in-store consumer testing;”
- “[T]he nature of any contract provisions that would require the retailers to provide live, in-store consumer testing;”
- “[T]he impact [the live, in-store testing requirement] would have on small business retailers and independent retailers;”
- Whether extending the live, in-store requirement would “create an unacceptable burden for independent retailers, small business retailers, or both;” and
- Whether “small business retailers have the physical space to fulfill this requirement.”⁴

In addition, although not expressly addressed in the *Further Notice*, by seeking comment on whether to extend the live, in-store testing requirement to independent retailers, the Commission appears to assume that independent retailers must comply with the Commission’s requirement to stock and offer hearing aid compatible wireless phones, which now applies only to wireless carriers and service providers.⁵ The question whether to extend the live, in-store testing requirement to independent retailers therefore also *presumes* that the Commission has the authority to require independent retailers to provide hearing aid compatible wireless phones.

³ *Id.* ¶ 61.

⁴ *Id.* ¶ 62-64.

⁵ Section 68.4(a) of the Commission’s Rules Governing Hearing Aid Compatible Telephones, *Report and Order*, 18 F.C.C. Rcd. 16753, 16780 (2003) [hereinafter *Hearing Aid Compatibility Order*] (requiring a certain number of wireless handsets offered by wireless providers to be hearing aid compatible); *see also Further Notice*, ¶ 20-28 (affirming these requirements on reconsideration).

RadioShack thus also addresses below whether Congress has delegated to the Commission such authority to do so.

RadioShack provides the following comments on these questions, as well as others posed in the *Further Notice* with respect to in-store testing. As described below, RadioShack asserts that the Commission lacks the authority under the HAC Act, the Communications Act, or agency law to require independent retailers to provide in-store testing of hearing aid compatible wireless phones, that the burdens and costs of such a requirement to independent retailers would be significant, and that, in any case, current return policies provide hearing impaired consumers the opportunity to test their wireless phones in a more effective manner than in-store testing.

III. COMMENTS

The Commission should not extend the live, in-store testing requirements to independent retailers because: (1) the Commission lacks jurisdiction to do so under the HAC Act, the Communications Act, and general principles of agency law; and (2) requiring independent retailers to provide live, in-store testing would impose undue burdens and costs on independent retailers, particularly since reasonable access to hearing aid compatible phones and opportunities to obtain such phones will exist at a minimum through wireless carriers without implementation of the live, in-store testing requirement proposed in the *Further Notice*.

A. The Commission Lacks Jurisdiction to Regulate Independent Retailers

“It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.”⁶ As set forth in detail below, because Congress has not authorized the Commission – either under the HAC Act or the Communications Act – to

⁶ American Library Ass’n v. FCC (*Broadcast Flag*), 406 F.3d 689, 691 (D.C. Cir. 2005). *See also infra* note 23.

regulate independent retailers, the Commission lacks jurisdiction to extend the live, in-store testing requirement to independent retailers.

1. The HAC Act Does Not Authorize the Commission to Regulate Independent Retailers

With the passage of the HAC Act, Congress authorized the Commission to regulate manufacturers of telephones in an effort to make telephone service more accessible to the hearing impaired. In doing so, Congress did not grant *any* authority to the Commission to regulate independent retailers. Accordingly, to the extent the Commission predicates its jurisdiction to extend the live, in-store testing requirement to independent retailers on the HAC Act, such reliance is unfounded, as it is inconsistent with Congress' intent and the Act's express grant of authority to the Commission.

In enacting the HAC Act, Congress declared that its purpose was to authorize the Commission to regulate manufacturers of telephone equipment. Congress stated that the purpose of the Act was to "require almost all telephones manufactured [in] or imported [into the United States] . . . to be compatible with hearing aids."⁷ Congress consciously chose to regulate manufacturers of telephones as a means of ensuring hearing aid compatibility. The Senate Report accompanying the Act explicitly demonstrates Congress' intent to regulate manufacturers, not others.⁸

The language of the Act delegating authority to the Commission reflects this legislative purpose. Under the Act, Congress granted the Commission the authority to "require that all essential telephones and all telephones manufactured in the United States . . . or imported for use

⁷ S. REP. NO. 100-391, at 1 (1988).

⁸ *Id.* at 4 (emphasis added).

in the United States . . . provide internal means for effective use with hearing aids”⁹ The Act expressly authorizes the Commission to regulate telephone manufacturers to ensure that telephones are hearing aid compatible.¹⁰ The detailed regulations the Commission has enacted pursuant to its authority under the HAC Act regarding the manufacture of telephones evinces the Congressional intent to regulate manufacturers. For example, pursuant to its authority, the Commission has issued regulations requiring all telephones manufactured in or imported into the United States to be hearing aid compatible.¹¹ The requirement also applies to various coin-operated, emergency-use, and frequently-needed telephones.¹² The Commission has also adopted technical standards for hearing aid compatibility with which all telephones must comply to be considered hearing aid compatible.¹³ The Commission’s hearing-aid compatibility regulations thus reflect Congress’ intended delegation of authority to the Commission: pursuant to its authority under the HAC Act, the Commission regulates the manner in which manufacturers make and provide hearing aid compatible telephones.

In a limited number of instances, the Commission has regulated non-manufacturers pursuant to its authority under the HAC Act. But to the extent the Commission has exercised jurisdiction over non-manufacturers, it has done so pursuant to the express authority given to it

⁹ 47 U.S.C. § 610(b)(1).

¹⁰ The Act’s precatory language is not inconsistent with Congress’ mandate to the Commission to regulate manufacturers. The introductory provision to the Act provides that the Commission “shall establish such regulations as are necessary to ensure reasonable access to telephone service by persons with impaired hearing.” *Id.* § 610(a). Congress chose to effectuate this goal by empowering the Commission to regulate manufacturers of telephones and did so in the Act’s next provision (§ 610(b)), which expressly grants the Commission the authority to ensure that phones are henceforth *manufactured* as hearing aid compatible. Compare *id.* § 610(a) with *id.* § 610(b).

¹¹ 47 C.F.R. § 68.4.

¹² *Id.* § 68.112.

¹³ *Id.* §§ 68.316-17.

by Congress to regulate “essential telephones” as a means of phasing-in the application of the Commission’s hearing-aid compatibility standards to landline telephones.

Prior to the enactment of the HAC Act, manufacturers were only required to make certain essential and emergency-use landline telephones hearing aid compatible.¹⁴ At that time, Congress had authorized the Commission to regulate only “essential telephones” and did not mandate that all telephones be hearing aid compatible.¹⁵ The 1982 Act defined “essential telephones” as “coin-operated telephones, telephones provided for emergency use, and other telephones frequently needed for use by persons using . . . hearing aids.”¹⁶

Congress passed the HAC Act in 1988, which required *all* landline telephones – not just “essential telephones” – to be manufactured as hearing aid compatible.¹⁷ In doing so, Congress expressly exempted wireless phones from the Act’s requirements.¹⁸ Congress authorized the Commission to repeal the wireless exemption under a specified set of criteria, which the Commission eventually did in 2003 in its *Hearing Aid Compatibility Order*.¹⁹

Because the HAC Act’s requirements were forward looking, there remained numerous existing landline telephones that the hearing impaired were unable to use. As a result, the Commission decided to regulate certain essential telephones by location (*e.g.*, workplaces, hospitals, hotels, motels) during the phase-in of the hearing aid compatibility standards as newly

¹⁴ S. REP. NO. 100-391, at 3. The HAC Act amended the Telecommunications for the Disabled Act of 1982, Pub. L. No. 97-410, 96 Stat. 2043 (1983).

¹⁵ Access to Telecommunications Equipment by the Hearing Impaired and Other Disabled Persons, 49 Fed. Reg. 1352, 1355 (Jan. 11, 1984) (adopting rules pursuant to the HAC Act’s predecessor, The Telecommunications for the Disabled Act of 1982, Pub. L. No. 97-410, 96 Stat. 2043 (1983)).

¹⁶ 96 Stat. at 2043. Under the HAC Act, the definition of an “essential telephone” has not changed. *See* 47 U.S.C. § 610(b)(4)(A).

¹⁷ 47 U.S.C. § 610(b)(1).

¹⁸ *Id.* § 610(b)(2)(a)(i). Specifically, the HAC Act exempts “telephones used with public mobile services.”

¹⁹ *Hearing Aid Compatibility Order*, 18 F.C.C. Rcd. at 16764-65.

manufactured landline phones were produced, distributed, and integrated throughout the country.²⁰ But even though Congress granted the Commission some authority to regulate non-manufacturers to facilitate the phase-in of hearing aid compliant phones in emergency situations, Congress made clear that it was principally delegating authority to the Commission to regulate manufacturers:

The [Senate] Committee notes that the number of telephone manufacturers is much smaller than the number of hotels, motels, and hospitals alone. . . . *By imposing the responsibility for hearing aid compatibility at the time of manufacture* rather than the time of installation, the law draws a clear line and places the burden for compliance on a smaller, and more organized, number of entities.²¹

Indeed, the legislative history of the HAC Act makes no mention of regulating non-manufacturers as means of improving the hearing-impaired user's access to landline telephones.

The Commission's authority to regulate essential and emergency-use telephones in order to phase-in the hearing compatibility standards does not alter the HAC Act's applicability to wireless phones. The initial need to impose some regulations on non-manufacturers existed in the landline context to ensure that the hearing impaired had access to hearing aid compatible phones, regardless of use or location. Because of the portable and personal nature of wireless phones, there is no need to regulate beyond the manufacturer, carrier or service provider in order to ensure access. A wireless phone belongs to the person who purchases it for exclusive and individual use. So long as the Commission requires that a certain number of hearing aid compatible phones are manufactured and offered for sale by wireless carriers/service providers, hearing impaired consumers will have the ability to obtain one if necessary. Indeed, when lifting

²⁰ S. REP. NO. 100-391, at 4 ("Since the bill does not apply to existing or refurbished telephones, the bill will not guarantee that hearing aid users can obtain access to a hearing aid compatible telephone in all situations. It will, however, speed along the *transition* to universal hearing aid compatibility at virtually no cost to the general public.")

²¹ *Id.* (emphasis added).

the HAC Act's wireless exemption, the Commission seems to have recognized the distinction between access to landline telephones and access to wireless phones when it decided to require that only *a portion* of wireless handsets offered by carriers be hearing aid compatible.²²

2. The Commission Lacks Authority under the Communications Act to Require Independent Retailers to Stock Hearing Aid Compatible Phones and Provide Live, In-Store Testing

As set forth below, the Commission cannot extend the live, in-store testing requirement directly to independent retailers pursuant to its authority under the Communications Act because (1) the Act only authorizes the Commission to regulate licensees and the use of spectrum, and (2) because § 217 of the Act and general principles of agency law only authorize the Commission to regulate wireless carriers, not their agents – assuming that an agency relation even exists.

a. The Communications Act authorizes the Commission to regulate wireless carriers, not independent retailers

While the Commission's regulatory authority under the Communications Act is broad, the Act does not authorize the Commission to regulate independent retailers in the same manner that it may regulate wireless carriers. As recently as this year and for several decades, federal courts have limited the Commission's authority to regulate in areas beyond the authority conferred by statute.²³ The Communications Act authorizes the Commission to regulate licensees of radio spectrum²⁴ and also grants the Commission jurisdiction to regulate providers

²² *Hearing Aid Compatibility Order*, 18 F.C.C.Rcd. at 16780 (requiring that wireless carriers/service providers make available a certain number of hearing aid compatible wireless phones effective September 16, 2005).

²³ *American Library Ass'n v. FCC (Broadcast Flag)*, 406 F.3d 689, 691 (D.C. Cir. 2005). *See also* *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (stating that "[t]hough afforded wide latitude in the supervision over communications by wire, the Commission was not delegated unrestrained authority"); *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586, 600 (1950); *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972).

²⁴ 47 U.S.C. § 301.

of commercial mobile radio service (CMRS).²⁵ However, there is no statutory authority to regulate an independent retailer – that is neither a licensee of spectrum nor a provider of CMRS – in the manner proposed by this *Further Notice*.

Although the Act provides the Commission the authority to regulate manufacturers of equipment used in radio communication,²⁶ the Act does not provide the Commission with general jurisdiction over retailers.²⁷ RadioShack concedes that the Commission’s regulation of the use of spectrum allows it to exercise jurisdiction over retailers in certain enforcement contexts. For example, in the event an unlicensed product interferes with a licensee’s use of its spectrum, the Commission has taken action against the manufacturer of the unlicensed product and also required the cessation of retail sales of such product.²⁸ However, Congress has not granted the Commission the general exercise of regulatory authority over retailers and RadioShack has found no precedent supporting the Commission’s exercise of authority to require the sale or consumer testing of a particular product by retailers.²⁹ Plainly, the Commission does not have the authority under the Communications Act to regulate independent retailers in the same manner it can regulate wireless carriers as licensees, as it attempts to do in this *Further Notice*.

²⁵ *Id.* § 332(e).

²⁶ *See, e.g., id.* §§ 302a, 303(e), 303(s), 303(u), 303(x).

²⁷ *Id.* § 302a.

²⁸ *See, e.g.,* Review of Part 15 and other Parts of the Commission’s Rules, ET Docket No. 01-278, *First Report and Order*, 17 F.C.C. Rcd.14063 (2002).

²⁹ The term “retailer” is not defined in the Communications Act and is only expressly referenced in the Act with regard to the competitive availability of navigation devices. *See* 47 U.S.C. § 549.

- b. Neither Section 217 of the Communications Act nor general principles of agency law authorize the Commission to regulate independent retailers as agents of their principals

In its *Further Notice*, the Commission asked whether it could rely on § 217 of the Communications Act to regulate independent retailers through their agency relationships with wireless carriers, and further asked whether the Commission could rely on the “provisions of general agency law” to regulate independent retailers.³⁰ For the reasons below, the Commission cannot rely on agency law, whether § 217 or general agency law, to exercise jurisdiction over independent retailers.

First, in posing the question, the Commission presumes that independent retailers are necessarily agents of the wireless carriers.³¹ In fact, this presumption is flawed. As demonstrated below, the contractual relationships between independent retailers and wireless carriers vary substantially. To determine whether an agency relationship exists, the Commission would need to engage in a fact-intensive, case-by-case analysis of each arrangement. This endeavor would be costly and onerous for the Commission and the parties, and in the end would not support the Commission’s exercise of general authority over independent retailers for this purpose.

Under general principles of agency law, a principal is responsible for the authorized acts of its agent.³² An agency relationship can be established in one of three ways: (i) actual authority; (ii) apparent authority; and (iii) ratification. Actual authority exists where a “written or verbal expression or other conduct of the principal . . . , reasonably interpreted, causes the

³⁰ *Further Notice*, ¶ 64.

³¹ *Id.*

³² See generally RESTATEMENT (SECOND) OF AGENCY §§ 140, 143 (1958).

agent to believe that the principal wants him to act on the principal's behalf."³³ Apparent authority is created "by conduct or expression of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to do the act for him."³⁴ A principal can also become responsible for the acts of an agent if the principal subsequently ratifies the prior act of another person.³⁵ Ratification occurs when a principal affirms a "prior act which did not bind him but which was done or professedly done on his account, such that the act, as to some person, is given effect as if originally authorized by [the principal]."³⁶

RadioShack, by way of example, has approximately thirty-five (35) separate contractual relationships with multiple wireless carriers. All of its contracts explicitly state that RadioShack does not act as an agent of the wireless carrier – thus, actual authority is never granted in the context of a RadioShack contract with a wireless carrier. These contracts vary somewhat in scope and nature, but the lack of an agency relationship is clearly and expressly stated in all cases. RadioShack is just one independent retailer, but its experience demonstrates that any agency law determination between independent retailers and wireless carriers would require a case-by-case consideration by the Commission – a wholly unrealistic proposition.

Importantly, even if the Commission establishes that an agency relationship exists generally between independent retailers and wireless carriers, § 217 of the Communications Act and general principles of agency law only authorize the Commission to regulate *principals* (i.e., wireless carriers and manufacturers) who may be responsible for the acts or omissions of their

³³ *Id.* § 26.

³⁴ *Id.* § 27.

³⁵ *Id.* § 143.

³⁶ *Id.* § 82.

agents. Thus, the Commission lacks the authority under § 217 of the Act and “general agency law” to extend the live, in-store testing requirement to independent retailers, even if they are “agents” of wireless carriers.

Section 217 of the Communications Act provides that “the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.”³⁷ This section makes clear that a carrier is responsible for the acts of its agent and that the Commission has the power to regulate the *carrier* if something its agent has done violates the Act. Section 217 in no way authorizes the Commission to regulate agents, however; it merely permits the regulation of principals to the extent their agents have violated provisions of the Act.³⁸

As under § 217 of the Communications Act, the “provisions of general agency law” do not authorize the Commission to exercise jurisdiction over independent retailers to require live, in-store testing.³⁹ The principles of agency law only provide that a principal can be liable for the authorized acts of an agent. To the extent the Commission finds independent retailers to be agents of wireless carriers, agency law permits the Commission to regulate wireless carriers, but in no way permits the Commission to regulate independent retailers as their agents.

³⁷ 47 U.S.C. § 217

³⁸ See, e.g., Long Distance Direct, Inc. ENF-99-01, *Memorandum Opinion and Order*, 15 F.C.C. Rcd. 3297, 3301-02 (2000); Metacomm Cellular Partners v. WWC Holding Co., Inc., WB/ENF-F-96-010, *Memorandum Opinion and Order*, 14 F.C.C. Rcd. 4983, 4989 (1999); Interstate Savings, Inc. d/b/a ISI Telecommunications, ENF-98-14, *Memorandum Opinion and Order*, 12 F.C.C. Rcd. 2934, 2936 (1997); Heartline Communications, Inc., ENF-95-18, *Notice of Apparent Liability for Forfeiture*, 11 F.C.C. Rcd. 18487, 18494 (1996).

³⁹ The law of agency is a matter of state common law, and thus this Comment hereinafter makes reference to the *Restatement (Second) of Agency* (1958) as authority to address the Commission’s question whether it may rely on “provisions of general agency law” to regulate independent retailers. See *Further Notice*, ¶ 64.

To find that § 217 or general agency law provide the Commission the broad jurisdiction over independent retailers proposed in the *Further Notice* would create a new and unwarranted precedent for the extension of regulatory authority that could severely restrict the ability of service providers and retailers to enter into contractual relationships in other areas, such as satellite service and VoIP, that often provide increased access and competition for consumers.

B. In the Event the Commission Determines It has Jurisdiction to Require Independent Retailers to Provide Live, In-Store Testing, It Should Not Do So Because of the Burdens and Costs Such Regulations Would Impose on Independent Retailers and Because Independent Retailers' Return Policies Offer a Better Solution for their Hearing Impaired Customers

In the event that the Commission determines that it has the authority to regulate the in-store testing of hearing aid compatible wireless phones ("HAC wireless phones") in independent retailer locations, the Commission should nevertheless decline to do so for the reasons set forth below. Extending the current requirements to independent retailers would place undue burdens and costs on independent retailers and would have the potential to hinder the current growth in locations and methods by which wireless services and phones are sold. RadioShack also believes that a live, in-store testing requirement is a far less effective means to assure performance than RadioShack's current return policy. Indeed, even the extensive record in the underlying proceeding provides no evidence of how a live, in-store testing requirement is more beneficial than a trial, return period. Requiring live, in-store testing of HAC wireless phones is far more complex than the Commission suggests in its *Further Notice*.

1. It is Unclear How the Commission Intends to Extend the Stocking and Live, In-Store Testing Requirements to Independent Retailers

As a threshold matter, it is important to consider whether the Commission's hearing aid compatibility compliance rules can even be applied to independent retailers. Indeed, the

Commission asks in the *Further Notice* whether independent retailers are “currently preparing to comport with our hearing aid compatibility rules, specifically with our rules on the number of compliant handsets that must be offered for sale and our live, in-store testing or a thirty-day trial period, which the Commission encourages.”⁴⁰ Yet, RadioShack is not sure what it would mean to comply with the rules. The rules require *wireless carriers* and *service providers* to ensure that a certain number or percentage of the handsets they offer are hearing aid compatible. However, independent retailers often have relationships with more than one carrier/provider. RadioShack, for example, has contractual relationships with a number of wireless carriers and also sells as many as thirty-six different models of wireless phones from six different manufacturers. It is not clear under the current rules whether retailers would be required to offer and provide testing for two or four models of HAC wireless phones as is currently required for the wireless carriers/service providers, or whether independent retailers might be burdened with the requirement that they offer and provide testing for two or four models of HAC wireless phones from *each* of the carriers/providers whose phones and service they offer.⁴¹

RadioShack, therefore, is not currently working to comply with the Commission’s rules in part because it does not believe the Commission has jurisdiction to require compliance, but also because it is unclear what would constitute compliance. Even if RadioShack could determine how to comply with the rules, there are numerous other reasons why such compliance would be unduly burdensome and would not provide customers with greater access or means by which to test HAC wireless phones.

⁴⁰ *Further Notice*, ¶ 65.

⁴¹ See 20 C.F.R. §§ 20.19(c)(2)(i), 20.19(c)(3)(i), 20.19(d)(2).

2. Live, In-Store Testing Will Diminish the Customer Service Independent Retailers Can Provide to their Customers and Many Independent Retailers Lack the Physical Space to Adequately Perform In-Store Testing

The Commission seeks information on the impact of the live, in-store testing proposal on small business retailers and independent retailers.⁴² Although not part of a small business, each RadioShack store has a number of characteristics which make it quite similar to a small consumer electronics retailer. RadioShack's average store size is 2,500 square feet and it sells on average 3,500 different products in each store. Only thirty (30) of those products, on average, are wireless handsets. In addition, each RadioShack store offers a number of wireless and video services, primarily wireless carrier service, satellite TV service, satellite radio service, broadband service and VoIP phone service. Two or three of those services offered, on average, are distinct wireless carrier services (*e.g.*, Sprint, T-Mobile, Verizon, Virgin). These facts distinguish independent consumer electronics retailers (of all sizes) from the retail outlets owned or operated by the wireless carriers/service providers, which are dedicated only to the sale of their own wireless service and which feature a product selection consisting primarily of their own branded service-related merchandise.

Because of the breadth of products and services sold in each store, RadioShack's sales associates are trained to provide customer service regarding a broad range of consumer products and needs. Yet, because of the small store size, RadioShack has only two to four sales associates on duty at any one time. On average, 150 customers enter a RadioShack store per day. Dedicating one or more sales associates to in-store testing potentially is a significant burden that would impair RadioShack's ability to serve other customers in the store.

⁴² *Further Notice*, ¶ 63.

In addition to its in-store sale of wireless phones, RadioShack also operates kiosks in many shopping malls and many third-party stores. The number of RadioShack-operated wireless kiosks expanded to over 650 in 2005.⁴³ The sale of wireless phones and service through kiosks is moving beyond malls to airports, truck stops and other locations. The use of kiosks significantly expands consumer access to wireless phones and service. However, it also presents certain challenges. First, with an average size of 100 square feet, there is a limit on the number of phones that can be kept in stock. Second, there is likely only one sales associate per kiosk. Providing live, in-store testing in a kiosk environment would significantly increase the amount of time spent on those transactions, with an effect on the efficiency and benefits of kiosk sales and overall customer service.

The current testing regulations state that the wireless carriers/service providers must “make available in each retail store owned or operated by the provider all of [the required] handset models for consumers to test in the store.”⁴⁴ It is unclear whether this means that all HAC wireless phones offered must be available for testing or that only samples of each hearing aid compatible model must be available for testing. For both small-sized stores and kiosks, the burden of providing in-store testing for all HAC wireless phones stocked is not simply significant, but practically impossible. Currently, RadioShack, and most retailers, maintain a small sample of phones for trial purposes in the store that are generally kept by sales associates at all times. However, providing hearing-impaired customers the opportunity to test each model available for purchase would require significant space, as well as time and expense on the part of the retailer to arrange with the wireless carrier the necessary phone numbers that can be

⁴³ Some of these kiosks are operated under the name RadioShack, others are operated under joint venture relationships with at least one other and sometimes two other parties. All of the kiosks are owned by RadioShack.

⁴⁴ 47 C.F.R. §§ 20.19(c)(2)(i), 20.19(c)(3)(i), 20.19(d)(2).

dedicated for each store to make the testing arrangement possible.⁴⁵ If the Commission's rule is meant to only require that a sample of each model be available for testing purposes, then RadioShack firmly believes, as set forth in more detail below, that its trial and return policy is a more effective means by which to test the actual product purchased.

3. Many Retail Locations Do Not Provide Adequate Wireless Service to Administer Live, In-Store Testing

The Commission has indicated that it believes that consumers would prefer live, in-store testing because it provides the opportunity to "test the effectiveness of a product *before* buying it."⁴⁶ In RadioShack's experience, in-store testing would *not* be an effective means by which to test the quality of a wireless phone. The reason is simple. Live, in-store testing does not accurately reflect the experience the user will have when using the wireless phone under his or her normal conditions. At a significant number of RadioShack store and kiosk locations, the wireless signal would be inadequate to provide an effective demonstration of a wireless phone's capabilities. Approximately 40 percent of RadioShack stores and kiosks are located in the interior of large, windowless shopping malls in which wireless service is often limited or varies significantly from one service provider to the next.⁴⁷ Realistically, an in-store test in this environment is merely a test as to which carrier has the best signal coverage in the mall – not

⁴⁵ In addition, shop-lifting is a problem that plagues all retailers and is one reason that live in-store testing of wireless phones is not more widely available. Even with display dummies and secured products, wireless phones represent a high loss category for RadioShack and other retailers. RadioShack is deeply concerned about the risk of increased shop-lifting that might result from imposing this testing requirement. If the Commission requires independent retailers to maintain live testing capabilities for all hearing aid compatible models offered, it would provide shop-lifters an opportunity to walk out of the store or away from a kiosk with a fully functional wireless phone.

⁴⁶ *Further Notice*, ¶ 38 (quoting SHHH Comments at 7) (emphasis in original).

⁴⁷ Some wireless carriers will locate signal repeaters near stores they own and operate, including some in malls, to improve their own signal strength, but any benefit that RadioShack may receive in its stores because of such a repeater is unintended. Unlike the wireless carriers, RadioShack and other independent retailers do not determine the placement of repeaters and towers.

which phone is best for the user. Indeed, if the in-store testing requirement were in effect for independent retailers, the variance in quality of service may have an unintended effect of skewing the sales of HAC wireless phones based upon the vagaries of signal quality in a mall.⁴⁸ Such a test could lead the consumer to purchase the wrong phone if the phone selected in the mall is from a carrier which has poor coverage where the user will actually use the phone. Thus, an in-store testing requirement for independent retailers would provide an *ineffective* and *inaccurate* demonstration of which phone and which service might be best for a hearing-impaired customer. In the alternative, as demonstrated below, RadioShack's generous return policy provides a much better opportunity for the customer to test their phone and service.

4. Many Independent Retailers Provide Generous and Flexible Return Policies that Provide Customers Better Opportunity to Test their Products

In its *Further Notice*, the Commission seeks information about independent retailers' current return policies.⁴⁹ Most, if not all, major independent retailers already provide their customers with generous trial periods and return policies.⁵⁰ RadioShack allows its customers to return any product within thirty days of purchase for a full refund, no questions asked, as long as the customer has the receipt of sale. In addition, RadioShack allows a customer to return the product to *any* of its 5,200 stores throughout the country, again so long as the customer has the receipt.

RadioShack has found that its return policy provides its customers ample time to test and evaluate its products. For a wireless customer, a thirty-day policy allows the customer to test the

⁴⁸ Unlike a wireless carrier's store where just one carrier's service is offered, an independent retailer often offers more than one carrier's service for sale. Such an in-store test may provide a customer with an inaccurate comparison of service by each carrier offered and have unintended competitive effects on the carriers.

⁴⁹ *Further Notice*, ¶ 65.

⁵⁰ See Comments of the Consumer Electronics Retailers Coalition (Sept. 26, 2005) to the *Further Notice*.

phone in a variety of locations and circumstances. RadioShack believes that this return policy is a more effective means by which to ensure that HAC wireless phone customers receive access to quality phones than the live, in-store testing requirement proposed by the Commission.⁵¹

Finally, as demonstrated below, RadioShack believes that a trial period and return policy can be used by any customer, regardless of how that customer purchases the phone. In contrast, an in-store test would not be applicable to the growing number of sales over the Internet, by phone or by catalogue.

5. The Live, In-Store Testing Requirement Does Not Apply to the Increasing Number of Sales by Independent Retailers over the Internet, by Phone, by Catalogue, or to the Increasing Sales of Pre-Paid Wireless Phones

The Commission appears to presume that wireless phone sales by independent retailers will always occur in a retail store setting. This is incorrect. Independent retailers do sell customers phones directly through face-to-face purchases in their stores. Today, however, wireless phones are also sold with increasing frequency over the Internet, by catalogue and over the phone. In addition, the market for pre-paid wireless service and phones continues to grow. RadioShack estimates that pre-paid sales currently represent 7.5 percent of the market and will expand to 13 percent by 2008.⁵² None of these alternative sales channels incorporate a testing opportunity. A return policy, however, can be used with all of these sales to provide customers the opportunity to test products and to return those with which they are dissatisfied.

⁵¹ RadioShack also notes that its review of the Commission's extensive record in this proceeding found no evidence any advocacy groups actively sought a live, in-store testing requirement for retailers.

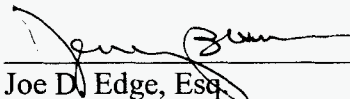
⁵² The type of independent retailers that sell pre-paid phones is also expanding, ranging from traditional consumer electronics stores to grocery and convenience stores, like Safeway and the local 7-Eleven convenience store.

As set forth above, RadioShack argues that a trial and return period is a better way for a customer to test a wireless phone (whether hearing aid compatible or not) than by live, in-store testing.

IV. CONCLUSION

For the reasons set forth above, RadioShack respectfully urges the Commission not to extend the live, in-store testing requirement to independent retailers. The Commission lacks the legal authority to make such an extension. In addition, the imposition of the live, in-store testing requirements would create an unnecessary and undue burden on independent retailers, particularly when their current return policies represent a more effective approach to ensuring that hearing-impaired consumers have the wireless phones they need.

Respectfully submitted,



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